IN THE

Supreme Court of the United States

OCTOBER TERM, 1942. No. 969

AMERICAN GAS AND ELECTRIC COMPANY,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

FREDERIC L. BALLARD,
KNOX HENDERSON,
1035 LAND TITLE BUILDING,
PHILADELPHIA, PA.
Attorneys for Petitioner.

J. P. VAN DE VOORT,
30 CHURCH STREET,
NEW YORK CITY, N. Y.
Of Counsel.

APRIL 28, 1943.

ALLEN, LANE & SCOTT, PRS., PHILADELPHIA.

INDEX.

CITATIONS.

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942. No. .

American Gas and Electric Company,
Petitioner,

v.

Securities and Exchange Commission,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

The undersigned, on behalf of the above named Petitioner, pray that a Writ of Certiorari issue to review a final Decree of the United States Court of Appeals for the District Court of Columbia rendered on February 1, 1943, in the case between the above named parties docketed therein as No. 7948.

OPINIONS BELOW.

The Opinion of the United States Court of Appeals was handed down on February 1, 1943, and is not yet reported (R. 518). The Securities and Exchange Commission issued an Opinion dated May 12, 1941, which will be reported in 9 S. E. C. 247 (R. 13).

JURISDICTION.

The Decree of the Court of Appeals was entered on February 1, 1943 (R. 518). This Petition is filed before May 1, 1943.

The jurisdiction of this Court is invoked under Section 24(a) of the Public Utility Holding Company Act of 1935 (hereinafter called the "Act," 49 Stat. 803; 15 U. S. C. A. Sec. 79) and under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A. Sec. 347).

MATTERS INVOLVED.

The basic matter involved is whether American Gas and Electric Company (herein sometimes called "American Gas") is or is not a subsidiary of Electric Bond and Share Company (herein called "Bond and Share") within the meaning of the Act. Both companies are public utility holding companies registered as such. Bond and Share owns 17.51% of the outstanding voting securities of American Gas and has two representatives on its Board of fifteen directors and one on its Executive Committee of five members.

The proceeding in the Court of Appeals was upon a Petition filed by American Gas, Petitioner herein, under Section 24(a) of the Act for review of an Order of the Securities and Exchange Commission (herein called the "Commission") which denied Petitioner's Application for an Order by the Commission declaring that Petitioner (American Gas) is not a subsidiary of Bond and Share.

Section 11(b) of the Act makes it the duty of the Commission "to require * * * that each registered holding company, *and each subsidiary company thereof,** shall take such action as the Commission shall find necessary to limit the operations of the holding-company system of which

* Emphasis supplied.

such company is a part to a single integrated public utility system," with provisions permitting the retention of one or more additional integrated systems under specified conditions not here involved.

Section 2(a) (29) (A) of the Act defines an "Integrated public-utility system" as follows:

> "(29) 'Integrated public-utility system' means—
>
> (A) As applied to electric utility companies, a system consisting of one or more units of generating plants and/or transmission lines and/or distributing facilities, whose utility assets, whether owned by one or more electric utility companies, are physically interconnected or capable of physical interconnection and which under normal conditions may be economically operated as a single interconnected and coordinated system confined in its operations to a single area or region, in one or more States, not so large as to impair (considering the state of the art and the area or region affected) the advantages of localized management, efficient operation, and the effectiveness of regulation;"

Section 2(a) (9) defines a holding company system as follows:

> "(9) 'Holding-company system' means any holding company, together with *all* its subsidiary companies, * * *." (Emphasis supplied.)

If American Gas is *not* a subsidiary of Bond and Share, the provisions of Section 11 of the Act requiring the integration of holding company systems will apply separately to its own system, namely, itself and its own subsidiaries, which, with unimportant exceptions, consist of eleven electric utility companies (all but two of which are presently interconnected) supplying approximately 830,000 customers in nine contiguous states, viz., New Jersey, Pennsylvania, Ohio, Indiana, Michigan, Virginia, West Virginia,

Kentucky and Tennessee, and the determination of the single integrated system which it will be allowed to retain (and also of such additional systems as it may be allowed to retain) will be determined without reference to and unaffected by the problems involved in the application of Section 11 to Bond and Share. Bond and Share has three acknowledged subsidiary holding companies each with numerous subsidiary operating utility companies operating in twenty-seven states and the problem of its "integration" is correspondingly large and complicated. And, if American Gas *is* a subsidiary of Bond and Share, then the provisions of Section 11 will apply to all of the companies in these combined systems which would be treated as a single holding company system of Bond and Share and the fate of Petitioner's system would be subject to such action as the Commission might deem necessary to limit the operations of the Bond and Share holding company system to a single integrated public utility system and such additional systems as the Commission might permit to be retained if it found that the strict requirements of the Act with reference to the retention of additional systems are met.

Thus the status of American Gas as being or not being a subsidiary of Bond and Share is a matter of great importance to American Gas and to the thousands of independent holders of its securities.

Section 2(a)(8) of the Act, the pertinent portions of which are printed as an Appendix at the end of the brief in support of this Petition, prescribes a formula and procedure for determining whether one company is a subsidiary of another company. Briefly, it is there provided that any company (in this case American Gas), ten per centum or more of whose outstanding voting securities are held by a specified holding company (in this case Bond and Share) is a subsidiary of the latter unless the Commission, upon application, finds that (i) it is not

controlled by the latter; (ii) that it is not an intermediary through which the latter controls some other company; and that

> "(iii) the management or policies of the applicant are not subject to a controlling influence, directly or indirectly, by such holding company (either alone or pursuant to an arrangement or understanding with one or more other persons) so as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the applicant be subject to the obligations, duties, and liabilities imposed in this title upon subsidiary companies of holding companies."

If the Commission does so find, the section provides that it "shall by order declare that a company is not a subsidiary company of a specified holding company."

Petitioner's Application to the Commission was made under that provision. The Commission, in denying the Application, based its action solely on clause (iii), the "controlling influence" clause, and adopted the construction applied to that clause by the United States Circuit Court of Appeals for the Sixth Circuit in *Detroit Edison Company* v. *Securities and Exchange Commission*, 119 Fed. (2d) 730 (May 12, 1941). This construction is, in substance, that "controlling influence" includes a "latent power to assume such control" and that the phrase "does not necessarily mean that those exercising controlling influence must be able to carry their point." The Commission's ultimate inferential finding of fact, advanced in support of its ultimate conclusion that "controlling influence," as so defined, existed in the present case, was the finding of "past relationships between applicant [American Gas] and Bond and Share which clearly 'have resulted in a personnel and tradition' which make applicant responsive to Bond and Share's desires." The Court of Appeals, in denying applicant's Petition for

Review, adopted the construction of the "controlling influence" clause which the Commission had used and also held:

> "Giving due weight to the past relationships of petitioner and Bond and Share and the other evidences of Bond and Share's present position of authority and influence in petitioner's management and stock ownership, we cannot say that the inferences drawn therefrom by the Commission to find 'a personnel and tradition' which make petitioner responsive to Bond and Share's desires are unreasonable."

Associate Justice Stephens filed a dissenting opinion (R. 531 to 547) in which he expressed himself as unable to agree with the Court's construction of "controlling influence" and in which he expressed the view that the basic facts relied on by the Commission do not give coherent or rational support to the Commission's inferential finding; that they in fact support a contrary influence, and that other facts of record are wholly inconsistent with the Commission's conclusion.

The matters involved thus include the proper construction of Section 2(a)(8) of the Act, which has never been construed by this Court, and the question of whether the Commission's ultimate finding of fact was supported by substantial evidence as required by Section 24(a) of the Act. On both of these points, the dissenting Associate Justice has expressed himself as in strong disagreement with the majority of the Court.

SPECIFICATIONS OF ERROR.

The Court of Appeals erred:

1. In its construction of the term "controlling influence" as used in the Act.

2. In holding that the Commission's inferential finding that the basic facts "show past relationships be-

tween applicant [American Gas] and Bond and Share which clearly 'have resulted in a personnel and tradition' which make applicant responsive to Bond and Share's desires" is supported by substantial evidence and is not unreasonable.

3. In denying the Petition to set aside the Commission's Order and in affirming the Order of the Commission.

QUESTIONS PRESENTED.

1. What is the meaning of the term "controlling influence" as used in the Act?

Is it some latent ability to bring into effect at some future time *some* influence but one which is impotent to control management or policies? Or is it a presently existing control by *influence* as distinguished, for example, from control by majority stock ownership or majority representation on the Board of Directors?

2. Is the Commission's inferential finding of "past relationships between applicant and Bond and Share which clearly 'have resulted in a personnel and tradition' which make applicant responsive to Bond and Share's desires" "supported by substantial evidence?"

Or is it an unwarranted inference erected upon but part of the evidence, *i. e.*, "past facts" which even considered alone give it no rational support; and an inference which is directly negatived by present facts established by competent, adequate, direct and uncontradicted evidence?

REASONS FOR GRANTING THE WRIT.

1. The interpretation of the phrase "controlling influence" in the Act must necessarily have an important effect upon the administration of the Act and upon public utility holding companies, public utility operating

companies, the investors in their securities and the consumers they serve. The Act was passed in 1935 and arguments and uncertainties about the meaning of this phrase have continued ever since. This question is one of substance and of general importance relating to the construction of a statute of the United States which has not been but which, it is respectfully submitted, should be settled by this Court.

2. The "substantial evidence" rule which is involved in judicial review of findings of administrative commissions under organic statutes which, like the Act here involved, provide that such commission's "findings * * * as to the facts, if supported by substantial evidence, shall be conclusive" warrants review by this Court in a case where, upon examination, it may appear that the Commission's ultimate and determinative finding is a pure inference erected on certain basic facts which give such inference no rational support and which *inference* is completely refuted by direct, competent and adequate proof of the contemporaneous and present ultimate fact. The dissenting Associate Justice was of opinion that the present case is such a case. If he be right, then, if further review is denied, Petitioner will have been subjected to an arbitrary ruling and action by the Commission which all would agree to be contrary to the system of law guaranteed by our Constitution and violative of Petitioner's rights thereunder.

Wherefore, it is respectfully submitted that the Petition should be granted.

FREDERIC L. BALLARD,

KNOX HENDERSON,
Attorneys for Petitioner.

J. P. VAN DE VOORT,
Of Counsel.

APRIL 28, 1943.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

[For index, table of cases, reference to opinions below, jurisdictional statement, statement of the case raised by the present Petition and Assignments of Error, we refer to the Petition.]

ARGUMENT.

The Argument is presented under two Points as follows:

POINT I.

THE PROPER INTERPRETATION OF THE PHRASE "CONTROLLING INFLUENCE" IN THE ACT IS A QUESTION OF SUBSTANCE RELATING TO THE CONSTRUCTION OF A STATUTE OF THE UNITED STATES WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

POINT II.

THE COMMISSION'S ULTIMATE INFERENTIAL FINDING OF "PAST RELATIONSHIPS BETWEEN APPLICANT [AMERICAN GAS] AND BOND AND SHARE WHICH CLEARLY 'HAVE RESULTED IN A PERSONNEL AND TRADITION' WHICH MAKE APPLICANT RESPONSIVE TO BOND AND SHARE'S DESIRES" IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE. THE EVIDENCE AS A WHOLE ESTABLISHES THE CONTRARY. THE COMMISSION'S INFERENCE IS DIRECTLY NEGATIVED BY PRESENT FACTS ESTABLISHED BY COMPETENT, ADEQUATE, DIRECT AND UNCONTRADICTED EVIDENCE. THE COMMISSION'S ORDER DENYING THE APPLICATION OF AMERICAN GAS FOR AN ORDER DECLARING IT NOT TO BE A SUBSIDIARY OF BOND AND SHARE IS ARBITRARY AND UNLAWFUL.

POINT I.

The Proper Interpretation of the Phrase "Controlling Influence" in the Act is a Question of Substance Relating to the Construction of a Statute of the United States Which Has Not Been But Should be Settled by This Court.

The question is one of substance and general importance because one interpretation as contrasted with another may determine, one way or the other, matters of major importance.

For example, in *Pacific Gas and Electric Company* v. *Securities and Exchange Commission*, 127 Fed. (2d) 378 (1942), now on rehearing in the United States Circuit Court of Appeals for the Ninth Circuit, this question of statutory interpretation will determine whether that intrastate operating utility is or is not within the ambit of the Act.

In the present case the matter which hangs on this question of interpretation is different but is equally material and of vital importance to American Gas.

American Gas is itself a registered holding company under the Act and, as such, it and its subsidiaries are fully subject to the provisions of the Act and to the jurisdiction of the Commission affecting such holding companies and their subsidiaries. It has no desire to be otherwise, and the present case involves no question as to this regulatable and regulated status of Petitioner and its own system. Petitioner has sought and still seeks recognition and declaration that it is not a subsidiary of Bond and Share so that the provisions of the Act and the Commission's orders to effectuate them shall, as to Petitioner, be addressed to it and its system directly and separately and not as a part of the larger and more complicated system of Bond and Share.

The declaration, to which Petitioner believes it is

entitled, that it is not, within the meaning of the Act, a subsidiary of Bond and Share, is of vital importance to Petitioner and its system in connection particularly with the application of the integration provisions of Section 11 of the Act. Under Section 11, each registered Holding Company must confine its operations to a single integrated public utility system* which is defined in Section 2(a)(29)(A) as units of generating plants, transmission lines and distributing facilities which "are physically interconnected or capable of physical interconnection and which under normal conditions may be economically operated as a single interconnected and coordinated system confined in its operations to a single area or region, in one or more States, not so large as to impair (considering the state of the art and the area or region affected) the advantages of localized management, efficient operation, and the effectiveness of regulation." Petitioner believes that its own present system conforms to this requirement, constituting one principal interconnected system extending generally from Roanoke, Virginia, to South Bend, Indiana, and two additional systems, one in Northeastern Pennsylvania and the other in Southern New Jersey. It has filed its Plan (Tr. Doc. No. 136) to this effect under Section 11(e) of the Act and the Commission has held extended hearings on that Plan, but that proceeding has not as yet been concluded and, of course, no finding or order has been made therein by the Commission.

Petitioner looks forward without alarm to the ultimate result of the application of the integration provisions of

* Section 11 also provides that the Commission shall permit a registered holding company to continue to control one or more additional integrated public utility systems if the Commission finds that each of such additional systems cannot be operated indepenently without the loss of substantial economies, that all of such additional systems are located in one state or in adjoining states and that the continued combination of such systems under the control of the holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation or the effectiveness of regulation.

the Act if applied directly and singly to its own system. But it looks forward with dismay to what may happen if its integration problem becomes but a part of the vastly more difficult and more confused problem of the integration of Bond and Share.

The complicated system of Bond and Share is described in footnote 5 to the Commission's findings as follows (R. 19):

> "Bond and Share also owns 20.7%, 42.4%, 46.6%, and 47%, respectively, of the outstanding voting securities of American Power and Light Company, American and Foreign Power Company, Inc., National Power and Light Company, and Electric Power and Light Corporation, all of them registered holding companies. By reason of such holdings, all of these companies are subsidiaries of Bond and Share under clause (*A*) of Section 2 (*a*) (8) and none of them has filed an application under the last paragraph of Section 2 (*a*) (8). These companies are sometimes referred to herein as acknowledged subsidaries of Bond and Share and as American Power, American and Foreign Power, National Power, and Electric Power, respectively. Utility companies in the Bond and Share system operate in 27 states and 13 foreign countries."

If American Gas *is* a subsidiary of Bond and Share, its fate merges with the fate of this complicated system and it is placed at the mercy of some final solution of Bond and Share integration which (whatever other aspects it may have) *must* leave Bond and Share with but one principal integrated system.

The Commission has recognized the vital importance of Petitioner's status as being, or not being, a subsidiary of Bond and Share by pointing out in footnote 64 to its findings that:

> "* * * the status of applicant [Petitioner] may be of vital importance to the determination which the Commission may make in the Section 11 proceeding presently pending against Bond and Share." (R. 59.)

This importance extends not only to "the determination which the Commission may make" but equally to the fate which Petitioner may suffer.

How *real* a question there is as to the correct construction of the phrase "controlling influence" as used in the Act may be seen by brief reference to some of the different views concerning it.

In the Act as originally introduced (H. R. 5423 and S. 1275, 79th Congress, 1st Session), the corresponding provision used the phrase "material influence." Later when Senate Bill 2796 was substituted for the original draft, this phrase was changed to "controlling influence." This would seem to furnish an accurate index of a precise legislative intent. Having pondered whether a *material* influence should be deemed sufficient to create a parent-subsidiary relationship, Congress decided it should not. To have that result Congress stipulated that an influence must be "controlling."

And the matter was so explained on the floor of the Senate by the manager of the bill.

> "Even if they hold 40% of the stock of a company they may come before the Commission and produce evidence that they are not actually in control of the company." (79 Cong. Rec. 8397.)

> "Unless I control that company I am not a holding company under the terms of this bill. The mere ownership of the 10 per cent of the stock does not of itself make him a holding company, because unless he actually controls the company he is not a holding company." (79 Cong. Rec. 8439.)

Legislative history, always a good guide to statutory construction, is here a guide of exceptional clarity. The end test of parent-subsidiary status was made "control." In clause (i) of Section 2(a)(8) the phrase "controlled, directly or indirectly by * * *" means control by ownership or representation: the classic forms of control such as majority stock ownership (as was substantially true in the Public Service Corporation of New Jersey Case*) or designation of the majority or all of the Board of Directors (as was true in the Detroit Edison Case†).

The substitute bill in which "material influence" had been changed to "controlling influence" was reported by the Senate Committee on May 7, 1935, with its Report No. 651 (S. 2796). The following paragraph appears on page 5 of that Report:

> "The term 'holding company' (together with its converse, 'subsidiary company') has been completely rewritten in the interests of clarity and definiteness so that persons may be more fairly apprised of their status under title I. In that part of the definition of holding company which is self-operative (*i. e.*, without determination in each case by the Commission) the original test was merely 'control' of operating companies. The committee has adopted the definite standard of 10 percent voting control—with provision whereby a company which does not actually control operating companies, even though it owns 10 percent or more of the voting control, can apply to the Commission for determination that it is not a holding company, and, pending the Commission's action on the application, be relieved of the provisions of the title. Corresponding changes have

* Public Service Company of New Jersey *v.* Securities and Exchange Commission, 129 Fed. (2d) 899.

† Detroit Edison Co. *v.* Securities and Exchange Commission, 119 Fed. (2d) 730.

been made in the definition of subsidiary company. The flexible part of each definition has been retained, *i. e.*, a person is a holding company *if the Commission finds that he exercises a 'controlling influence' over the management or policies of a utility company.* S. 1725 had used the phrase 'material influence.' The provision that a person is not affected by this part of the definition until after the Commission's hearing and determination has been retained; and a similar provision has been added for the benefit of subsidiary companies under that portion of the converse definition." (Emphasis supplied.)

The following paragraphs appear on page 23 of the same report:

"'Holding company' (7) is defined in two parts: (A) In terms of ownership, directly or indirectly, of 10 percent of the voting control of a utility (gas or electric) company; and (B) in terms of '*exercising a controlling influence*' over the management or policies of a utility company. Under the flexible definition in (B), no company is to be deemed a holding company or have any duty as such until the Commission so finds after notice and opportunity for hearing. The flexibility here provided is necessary in order that title I can meet the *varied* and subtle *forms* which corporate interrelationships have in the past and will in the future take. A company which is automatically a holding company under (A) by reason of stock ownership can nevertheless file an application for determination that it is not a holding company *in terms of controlling a public-utility company.* Pending the Commission's action on such an application, the provisions of the title are suspended as to the applicant. (Emphasis supplied.)

"'Subsidiary company' (8) is also defined, conversely from 'holding company', in terms of stock

> ownership and subjection to a controlling influence; the same administrative machinery for Commission determination and exemption is provided."

These two paragraphs also appear in identical form at page 9 of House Report No. 1318 of June 24, 1935.

"Controlling influence" means "control by influence" and covers, as contrasted with "controlled by," a different mechanism to the same end result, *i. e.*, "control." It was with different "forms" that Congress was concerned, not with different end results. The relationship in some form had (1) to exist and (2) either be "controlling" or produce the result "control" which are one and the same thing.

But the Court of Appeals has now construed "controlling influence" to cover an influence not presently in action and one which, if aroused to action, is impotent to control.

In so doing, that Court has adopted the construction of "controlling influence" announced by the Circuit Court of Appeals, Sixth Circuit, in the Detroit Edison Case (*supra*), which was in turn followed by the Circuit Court of Appeals for the Third Circuit in the Public Service Company of New Jersey Case (*supra*). We are aware that petitions for certiorari were denied in both of those cases. We do not, however, construe such denials as the adoption by this Court of such construction of "controlling influence." In each of those cases, the holding company in question actually had control. In the Detroit Edison Case, it appeared (119 Fed. (2d) at p. 735):

> "The personal stockholdings of petitioner's directors and of its officers are negligible. None of petitioner's stockholders, other than North American, ever appear to have designated any of petitioner's

> officers or directors and none of petitioner's officers or directors appear to have had any relationships to any substantial stockholder of petitioner except North American."*

and

> "For many years petitioner has designated representatives to the Station Advisory Committee, an organization consisting of a group of engineers meeting to exchange ideas on operating methods, costs of properties and technical developments. All other companies participating in the activities of the committee are statutory subsidiaries of North American."†

If I am the only stockholder represented on the Board of Directors of a company and designate all of its directors and officers, I am, so long as that set of facts exists, in control of that company; particularly if, in addition,

* No such situation exists in the present case. Only two of Petitioner's board of fifteen and one of its Executive Committee of five have any connection with Bond and Share or with any company in the Bond and Share system. It does not appear that Bond and Share ever "designated" any of Petitioner's directors. Many members of the board, including some who are Petitioner's officers and some who are not, own or represent large independent stockholdings (R. 536, 27, 30, 37, 38). In each of the years 1938, 1939 and 1940 a vacancy occurred on Petitioner's board and these vacancies were filled as follows: In 1938 by the election of G. A. Elliott, a large holder of Petitioner's stock having no connection with Bond and Share and suggested by Petitioner's President, Mr. Tidd (R. 314); in 1939 by the election of R. E. Breed 3d, representing large family holdings of Petitioner's stock (R. 314) and having no connection with Bond and Share; in 1940 by the election of G. M. Moffett, an experienced executive as President of Corn Products Refining Company having no connection with Bond and Share and suggested by Harrison Williams (R. 314), an independent director with no connection with Bond and Share.

† Petitioner in the present case has always had its own technical, managerial and supervisory staff and has never received any service or advice from Bond and Share's similar staff which renders such services to Bond and Share's acknowledged subsidiaries. In financial matters only has Bond and Share, in the years when it acted as Petitioner's fiscal agent, ever supervised any activities of American Gas and this ceased in 1928-1931 (R. 538).

its officers regularly confer on operating and technical matters with the officers of my other companies. The decision in the Detroit Edison Case would have been the same if the Court of Appeals had construed "controlling influence" to mean "control by influence."

In the Public Service Company of New Jersey Case (*supra*), it appeared that United Corporation and its subsidiary, United Gas Improvement Company, owned together 42.3% of the voting stock of Public Service and from 1929 to 1940 cast a majority of the total votes cast at each annual meeting of Public Service stockholders. This, in the business world, would be considered effective control. This case might have been decided under the control clause (viz., clause (i) of Section 2(a)(8)) but was probably more appropriately decided under clause (iii) inasmuch as the effective control by stock ownership was split between two affiliated companies. And the decision would have been the same if the Court of Appeals had construed "controlling influence" to mean "control by influence."*

Four months before the Court of Appeals for the Third Circuit, in deciding the Public Service Case, followed the construction of "controlling influence" previously announced by the Court of Appeals for the Sixth Circuit in the Detroit Edison Case, the Court of Appeals for the Ninth Circuit, in deciding the Pacific Gas and Electric Case, announced a wholly new construction of the "controlling influence" clause by which not three (viz., (i), (ii) and (iii)) negative tests must be met, but four, the fourth being independent of the three enumerated in the section and being erected from the qualifying phrase:

* No such situation exists in the present case. Bond and Share holds but 17.51% of Petitioner's outstanding voting securities and for many years has voted only about 25% of the total shares represented and voting at meetings of Petitioner's stockholders (R. 46).

> "so as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the applicant be subject to the obligations, duties and liabilities imposed in this title upon subsidiary companies of holding companies."

In a dissenting opinion, Circuit Judge Garrecht stated his view on this question of construction as follows (127 Fed. (2d) at p. 392):

> "It seems to me that the opinion of the Court has added to the Act by judicial construction conditions not imposed by Congress and by which the Commission has been relieved of the obligation which requires that the findings be sustained by substantial evidence."

The present status of this important question of statutory construction is this:

1. We have the interpretation announced in the Detroit Edison and Public Service cases, but not, it is submitted, necessary to their decision.

2. We have the totally different interpretation announced by the majority opinion in the Pacific Gas and Electric Case, now upon rehearing before the Court that announced it.

3. We have the interpretation indicated by the ordinary meaning of the word "controlling" and by the legislative history and congressional debates, and propounded by Circuit Judge Garrecht in his dissenting opinion in the Pacific Gas and Electric Case.

4. In the present case we have the Detroit Edison interpretation adopted by the majority, with Associate Justice Stephens in a dissenting opinion notable for completeness, precision and clarity announcing as his own interpretation one closely similar to that of Circuit Judge Garrecht.

It is apparent that neither the Court of Appeals for the Ninth Circuit nor Circuit Judge Garrecht nor Associate Justice Stephens consider that this Court settled that question of statutory interpretation when it denied the petition for certiorari in the Detroit Edison Case.

It is respectfully submitted that the question is of such substance and such general importance that it should be settled by this Court.

And this case is an appropriate one for such settlement of that question because, regardless of the disposition of the question under the "substantial evidence" rule (Point II of this Argument), the action of the Court of Appeals and of the Commission cannot be upheld unless "controlling influence" is interpreted to mean something that is not controlling.

POINT II.

The Commission's Ultimate Inferential Finding of "Past Relationships Between Applicant [American Gas] and Bond and Share Which Clearly 'Have Resulted in a Personnel and Tradition' Which Make Applicant Responsive to Bond and Share's Desires" Is Not Supported By Substantial Evidence. The Evidence As a Whole Establishes the Contrary. The Commission's Inference Is Directly Negatived By Present Facts Established by Competent, Adequate, Direct and Uncontradicted Evidence. The Commission's Order Denying the Application of American Gas for an Order Declaring It Not to Be a Subsidiary of Bond and Share Is Arbitrary and Unlawful.

In presenting this point, we are well aware that the recent decisions of this Court have set very narrow limits

to the scope of judicial review of the findings of fact made by an administrative commission functioning under a statute which provides that such findings "if supported by substantial evidence, shall be conclusive."

It is for the Commission to find the basic facts, and as to its factual findings of this character, no question is here raised.

It is for the Commission, in the first instance, to indulge inferences from basic facts but those inferences must arise from a consideration of the entire record and must bear a logical and coherent relationship to the basic facts from which they are inferred. If a reasonable man, upon the whole record, could not reach the ultimate inferential finding which the Commission has made, then that finding is not supported by substantial evidence and the Commission's action bottomed thereon is arbitrary and capricious and should be reversed.

It was our contention in the Court of Appeals, and will be our contention in this Court, should the writ be granted, that this is such a case.

Specifically, we contend:

1. That the Commission's ultimate inferential finding of " 'a personnel and tradition' [in American Gas] which make applicant [American Gas] responsive to Bond and Share's desires" was bottomed not on the entire record but on a part only, viz., on "past relationships" concededly no longer existing.

2. That those partial basic facts, in the language employed by the dissenting Associate Justice, "support no reasonable inference of presently effective domination by

Bond and Share of American Gas management or policies and that they reasonably support a contrary inference." And that other basic facts enumerated by the dissenting Associate Justice (R. 544, 545), "while consistent with all of the other facts in the case, are * * * wholly inconsistent with the conclusion which the Commission has drawn, *i. e.*, that American Gas is 'responsive to Bond and Share's desires'."

3. That, even if the Commission's inferential finding did bear a rational and coherent relation to the partial facts on which the Commission sought to bottom it, it must fall before direct contemporaneous proof which shows that the fact inferred does not exist.

We accept the dissenting Opinion of Associate Justice Stephens as adequately presenting, for the purposes of this brief, our contention that the Commission's ultimate finding of fact is not supported by substantial evidence and that the Commission's action based thereon is arbitrary and capricious and should be reversed.

One feature of this case does, however, warrant special mention because no such feature was present in the Detroit Edison Case or the Public Service Case or the Pacific Gas and Electric Case or, so far as we have been able to find, in any other case which has arisen under Section 2(a)(8) of the Act:

In those cases the Commission necessarily had to rely on inferences because there was no proof of a current attempt by the specified holding company to exercise its influence to control its alleged subsidiary in a matter of management or policy.

In this case such an event occurred, and its occurrence and its outcome are proved by direct, competent and un-

contradicted testimony. All of this is succinctly set forth in footnote 16 to Associate Justice Stephens' dissenting Opinion (R. 539) to which we respectfully refer. The question of the best policy to pursue in meeting Section 11 of the Act was and still is a question of policy of the first magnitude for any holding company. In the Fall of 1938 when some step was ripe to be taken in this matter, the officers of American Gas thought the best policy for it was to file for its own system a formal Plan of Integration under Section 11(e). The officers of Bond and Share disagreed with this judgment and did their best to induce the officers of American Gas to adopt a different policy. Their efforts failed to control, or even to affect at all, the policy determined on by the officers of American Gas. The original policy of American Gas was pursued, unaltered, although this, because of the conflict of interest involved, necessitated the employment by American Gas of independent counsel. This was done, American Gas filed its own formal Plan, which has been the subject of hearings by the Commission and is still there pending.

It is not here important which view on this vital question of policy was the wisest. It is clear that both groups of officers were sincere as to the wisdom of their own respective and divergent views. And being so convinced on this matter of vital policy, Bond and Share exerted the full weight of its influence to control the policy of American Gas, and failed. That influence, when thus currently put to the test, was found impotent to control.

In the face of such direct contemporaneous proof, an inference from "past relationships" of "'a personnel and tradition' which make applicant responsive to Bond and Share's desires" cannot stand.

In *Pennsylvania Railroad Company* v. *Chamberlain,* 288 U. S. 333 (1933), this Court said at pages 340-341:

> "And the desired inference is precluded for the further reason that respondent's right of recovery depends upon the existence of a particular fact which must be inferred from proven facts, and this is not permissible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist. * * * A rebuttable inference of fact, as said by the court in the Wabash Railroad case [141 Fed. 932, 935 (C. C. A. 8th, 1905)], 'must necessarily yield to credible evidence of the actual occurrence.' And, as stated by the court in George *v.* Missouri Pac. R. Co. * * * [213 Mo. App. 668, 674, 251 S. W. 729, 732 (1923)], 'It is well settled that where plaintiff's case is based upon an inference or inferences, * * * the case must fail upon proof of undisputed facts inconsistent with such inferences.' * * *"

The foregoing quotation is also quoted in footnote 3 to the dissenting Opinion (R. 532, 533), to the whole of which footnote we most respectfully refer as presenting the legal principles which we believe are involved in the application of the "substantial evidence" rule. When these principles are applied to the entire record in the present case, it will appear that the Commission's ultimate finding of fact is not supported by substantial evidence and that its action based thereon is arbitrary and capricious.

CONCLUSION.

Petitioner submits that either Point I or Point II summarized above furnishes an adequate reason why this Court should review the action of the Court below and, to this end, grant our Petition for a Writ of Certiorari.

Respectfully submitted,

FREDERIC L. BALLARD,

KNOX HENDERSON,
Attorneys for Petitioner.

J. P. VAN DE VOORT,
Of Counsel.

APRIL 28, 1943.

APPENDIX.

Sec. 2.(a) * * *

(8) "Subsidiary company" of a specified holding company means—

(A) any company 10 per centum or more of the outstanding voting securities of which are directly or indirectly owned, controlled, or held with power to vote, by such holding company (or by a company that is a subsidiary company of such holding company by virtue of this clause * * *) unless the Commission, as hereinafter provided, by order declares such company not to be a subsidiary company of such holding company;

* * * * * * *

The Commission, upon application, shall by order declare that a company is not a subsidiary company of a specified holding company under clause (A) if the Commission finds that (i) the applicant is not controlled, directly or indirectly, by such holding company (either alone or pursuant to an arrangement or understanding with one or more other persons) either through one or more intermediary persons or by any means or device whatsoever, (ii) the applicant is not an intermediary company through which such control of another company is exercised, and (iii) the management or policies of the applicant are not subject to a controlling influence, directly or indirectly, by such holding company (either alone or pursuant to an arrangement or understanding with one or more other persons) so as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the applicant be subject to the obligations, duties, and liabilities imposed in this title upon subsidiary companies of holding companies. The filing of an application hereunder in good faith shall exempt the applicant from any obligation, duty, or liability imposed in this title upon the applicant as a subsidiary company of such specified holding company until the Commission has acted upon

such application. Within a reasonable time after the receipt of any application hereunder, the Commission shall enter an order granting, or, after notice and opportunity for hearing, denying or otherwise disposing of, such application. As a condition to the entry of, and as a part of, any order granting such application, the Commission may require the applicant to apply periodically for a renewal of such order and to file such periodic or special reports regarding the affiliations or intercorporate relationships of the applicant as the Commission may find necessary or appropriate to enable it to determine whether in the case of the applicant the conditions specified in clauses (i), (ii), and (iii) are satisfied during the period for which such order is effective. The Commission, upon its own motion or upon application, shall revoke the order declaring such company not to be a subsidiary company whenever in its judgment any condition specified in clause (i), (ii), or (iii) is not satisfied in the case of such company, or modify the terms of such order whenever in its judgment such modification is necessary to ensure that in the case of such company the conditions specified in clauses (i), (ii), and (iii) are satisfied during the period for which such order is effective. Any action of the Commission under the preceding sentence shall be by order. Any application under this paragraph may be made by the holding company or the company in respect of which the order is to be entered, but as used in this paragraph the term "applicant" means only the company in respect of which the order is to be entered.

INDEX

CITATIONS

528655—43——1

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 969

AMERICAN GAS AND ELECTRIC COMPANY, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The findings and opinion of the Commission (R. 13),[1] not yet officially reported, are set forth in the Commission's Holding Company Act Release No. 2749. The opinion of the United States Court of Appeals for the District of Columbia (R. 518) affirming the order of the Commission, and the dissenting opinion of Justice Stephens (R. 531), have likewise not yet been officially reported.

[1] References are to the printed portion of the record.

JURISDICTION

The decree of the Court of Appeals was entered February 1, 1943 (R. 548). The petition for a writ of certiorari was filed on April 28, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, made applicable by Section 24 (a) of the Public Utility Holding Company Act of 1935 (hereinafter referred to as the "Act").

QUESTION PRESENTED

More than ten percent of petitioner's outstanding voting securities are owned by Electric Bond and Share Company, a public utility holding company registered as such under the Act. Petitioner applied to the Commission for an order declaring that it was not a "subsidiary company" of Electric Bond and Share Company under Section 2 (a) (8) of the Act. The basic question presented is whether petitioner has shown that its management or policies are not "subject to a controlling influence" by Electric Bond and Share Company within the meaning of the statute.

STATUTE INVOLVED

The applicable provisions of the Public Utility Holding Company Act of 1935 are set forth in the Appendix, *infra*, pp. 18–20.

STATEMENT

The petitioner, American Gas & Electric Company ("American Gas"), is a registered holding

company owning all the common stock of eleven electric utility subsidiaries (R. 153). Electric Bond and Share Company ("Bond and Share") owns 17.51% of petitioner's outstanding voting securities (R. 159).

Since more than 10% of petitioner's outstanding voting securities are owned by Bond and Share, it is thus a "subsidiary company" of Bond and Share under Section 2 (a) (8) (A) of the Act, subject to an application for a declaration to the contrary by the Commission under the succeeding paragraph of Section 2 (a) (8). Petitioner brought this proceeding under that paragraph, asking the Commission to declare that it was not a subsidiary company of Bond and Share. The Commission denied the application on the ground that petitioner had not sustained the burden of proving that its management or policies "are not subject to a controlling influence" by Bond and Share within the meaning of clause (iii) of that paragraph. The findings and opinion of the Commission, as sustained by the Court of Appeals, one Justice dissenting, may be summarized as follows:

American Gas, the first subholding company organized by Bond and Share, was incorporated in 1906 (R. 153)[2] to acquire securities of utility

[2] Bond and Share itself had been incorporated only the year before (R. 322). After organizing American Gas, Bond and Share formed American Power & Light Company (1909), National Power & Light Company (1921), American

companies from Electric Company of America (R. 488). In the organization, the details of which were handled by Bond and Share's board of directors and general counsel (R. 198), Bond and Share acquired 8% of American Gas' voting stock, without making any substantial investment (R. 328). In 1929–30, Bond and Share increased its holdings of petitioner's voting stock to the present percentage of 17.51% (R. 328, 489–90). This stock constitutes Bond and Share's most important investment and chief source of income, accounting for 47.5% of its income in 1939 (R. 46, 523).

Bond and Share is the largest single holder of petitioner's stock (R. 462), the balance being distributed among more than 20,000 holders (R. 462–3), of whom no individual or organized group holds as much as 4% (R. 524). The second largest block is held by a former chairman of the board of both Bond and Share and American Gas, and his wife (R. 46, 261, 379, 524).

At the stockholders' meetings, Bond and Share's vote has generally represented about 25%

& Foreign Power Company (1923), and Electric Power & Light Corporation (1925) (R. 19, 25, 326, 519), all registered holding companies and subsidiaries of Bond and Share under Section 2 (a) (8) of the Act (R. 162–63, 342–43). Bond and Share owns 20.7%, 46.6%, 42.4%, and 47%, respectively, of the outstanding voting securities of these companies (R. 19). They have been collectively referred to throughout this proceeding as the "acknowledged subsidiaries" of Bond and Share.

of the total vote cast (R. 490–1). These meetings have been controlled (through proxies given by more than 95% of those voting, including Bond and Share (R. 168)) by petitioner's proxy committees, whose membership, from 1923 to 1938, consisted exclusively of officers and directors of Bond and Share or its acknowledged subsidiaries (R. 524). Since then, although formal ties no longer exist, Bond and Share has continued to entrust the committees with its vote (R. 170). There has never been a proxy fight or even any group opposition to Bond and Share (R. 374, 491).

The management of American Gas has from the beginning been closely identified with Bond and Share. Each of the two chairmen of the board of American Gas has at the same time been chairman of the board of Bond and Share (R. 142–3). The first officers and eleven of the fifteen original directors were affiliated with either Bond and Share or the law firm serving as its general counsel (R. 198, 444–50). Between 1907 and 1935, close to a a majority, and in 1931–32 an actual majority, of petitioner's board were directors, officers, or employees of Bond and share or of its acknowledged subsidiaries (R. 444–50, 523). At the time of the proceeding, although the number of Bond and Share men on the board of American Gas had been reduced, there were still on the board of Ameri-

can Gas two directors of Bond and Share (one of whom was chairman of the board of both companies (R. 143, 144)), two former directors of acknowledged Bond and Share subsidiaries (R. 180, 182), and three who had become directors or officers during the period when Bond and Share admittedly controlled American Gas (R. 176, 178). Of the remaining seven, two were physically incapacitated and inactive (R. 179, 313–14).

From 1910 to 1936, a clear majority of the executive committee of American Gas were officials of Bond and Share or its acknowledged subsidiaries (R. 523). At the time of the proceeding, the committee was headed by the chairman of the board of Bond and Share (R. 175); two members had for many years been directors of Bond and Share's acknowledged subsidiaries (R. 176, 180); one had a record of cooperation with Bond and Share representatives dating back to the formation of American Gas (R. 180); and only the fifth member had never been affiliated with Bond and Share (R. 177).

Since 1910,[3] American Gas has had two presidents, both closely affiliated with Bond and Share or its acknowledged subsidiaries over a large part of their careers (R. 141–42). Its present president, who has been connected with American Gas

[3] The first president, with whom the board had some differences, was removed in that year (R. 270, 449–50).

since its organization (R. 179), attained his present position and a very large part of his personal wealth during his thirty-three years' association with the Bond and Share system (R. 37, 141, 256–58).

When American Gas was formed, Bond and Share had not yet developed the service and management force (R. 94, 326) which it afterward created for its later organized subsidiaries. The operating staff of Electric Company of America, which was taken over by American Gas (R. 326) along with the properties, was retained because its work was satisfactory and its personnel had the confidence of the Bond and Share representatives who supervised and directed them (R. 279). While some of their operating policies have differed from those followed by the acknowledged Bond and Share subsidiaries (R. 94–115), these differences are primarily of a local nature (R. 93, 343–44). From 1910 to 1932, petitioner, Bond and Share, and American Power had a service arrangement with the same engineering firm with respect to construction services, reports and advice (R. 218); and, until 1936, American Gas used group purchase contracts of Bond and Share with various manufacturers to obtain discounts available only to acknowledged Bond and Share subsidiaries (R. 425).

Bond and Share conducted all financing operations for American Gas and its subsidiaries from

528655—43——2

1907 to 1930 (R. 187–88), and on this ground petitioner has conceded that it was subject to the controlling influence of Bond and Share during those years (R. 271–72, 521). From 1931 to 1937, no financing was undertaken by American Gas or its subsidiaries (R. 376). Since 1937, while petitioner has carried on its own financing operations, the chairman of the boards of Bond and Share and American Gas has kept in close touch with these activities, a large part of the legal work has been done by Bond and Share's general counsel (R. 295, 376), and substantially the same investment bankers who had served American Gas under Bond and Share's fiscal management continued to be used (R. 280–81, 336).

In 1936, when the Commission brought suit against American Gas, Bond and Share, and its acknowledged subsidiaries, to enforce compliance with the Act,[4] their joint answer to the Commission's complaint alleged that (R. 513–14):

> All of the holding company defendants * * * are subsidiary companies of the defendant Bond and Share * * * within the meaning of Section 2 (a) (8) of said Holding Company Act and none of said companies is entitled to exemption or to claim exemption as a subsidiary company under the terms of Section 2 (a) (8) * * *

[4] *Securities and Exchange Commission* v. *Electric Bond & Share Co.*, 18 F. Supp. 131 (S. D. N. Y.), *affirmed*, 92 F. (2d) 580 (C. C. A. 2d), *affirmed*, 303 U. S. 419.

> of said Act, or otherwise, or any other section thereof. Exemption of said holding * * * company defendants as holding companies would be comparatively valueless to them as they would remain subsidiary companies subject to all, or practically all, the provisions of said Act.

The law firm which represented them in this suit had been their common general counsel since American Gas was organized (R. 296, 348).

In 1938, after American Gas had filed its application under Section 2 (a) (8), it prepared a formal plan for compliance with Section 11 of the Act (R. 468). Bond and Share, at the time, proposed to submit only tentative proposals which dealt with, among others, the properties of American Gas (R. 202), and asked it not to file the formal plan (R. 203). When, however, American Gas did file its plan, there was no dissent by the Bond and Share representatives on its board (R. 470). About a year later, the chairman of the boards of American Gas and Bond and Share suggested that petitioner withdraw its formal plan and file an informal plan (R. 208); but after counsel for American Gas expressed the opinion that it would be a mistake to withdraw it, "the thought was not pressed and the subject was passed over" (R. 209).

On this record the Commission determined that American Gas had not sustained its burden of proving that it is not a subsidiary of Bond and Share.

ARGUMENT

The sole issue is whether there is a rational basis for the Commission's determination that American Gas has not sustained the burden of showing that it is not subject to the controlling influence of Bond and Share. The decision of the court below affirming the Commission's order is correct and does not call for further review.

1. Since 17.51% of petitioner's outstanding voting securities are owned by Bond and Share, petitioner is a "subsidiary company" of Bond and Share under Section 2 (a) (8) (A) of the Act. However, the Commission, upon application, is required to declare petitioner not to be a subsidiary company of Bond and Share if petitioner can prove by a preponderance of the evidence that it meets all of the three statutory conditions,[5] one of which reads, in pertinent part, as follows:[6]

> (iii) the management or policies of the applicant are not subject to a controlling influence, directly or indirectly, by such holding company * * *.

---

[5] *Detroit Edison Co.* v. *S. E. C.*, 119 F. (2d) 730, 739 (C. C. A. 6th), certiorari denied, 314 U. S. 618; *Public Service Corporation of New Jersey* v. *S. E. C.*, 129 F. (2d) 899, 902 (C. C. A. 3d), certiorari denied, 317 U. S. 691; *Hartford Gas Co.* v. *S. E. C.*, 129 F. (2d) 794, 796 (C. C. A. 2d); *Pacific Gas & Electric Co.* v. *S. E. C.*, 127 F. (2d) 378, 382 (C. C. A. 9th), argued on rehearing December 1942.

[6] The Commission deemed it unnecessary to consider the questions raised under clauses (i) and (ii) of Section 2 (a) (8) since the petitioner did not meet the condition of clause (iii). These clauses are set out in the Appendix, *infra*.

The issue was one of fact to be determined by the particular circumstances of this case. *Rochester Telephone Corp.* v. *U. S.*, 307 U. S. 125, 145. The Commission was required to look for "controlling influence" in "varied and subtle forms" of corporate interrelationships.[7] Sen. Rept. 621, 74th Cong., 1st sess., p. 23; H. Rept. 1318, 74th Cong., 1st sess., p. 9. Since American Gas was for twenty-six years, until 1931, admittedly subject to the controlling influence of Bond and Share, the question of the weight to be given the passage of time and the subsequent efforts to create a status of independence was for the Commission to determine.[8]

The voluntary withdrawal of all but two acknowledged Bond and Share men from the board and executive committee of American Gas reflected a program of escape from the impact of the Holding Company Act, rather than an asser-

[7] See *Detroit Edison Co.* v. *S. E. C.*, 119 F. (2d) 730 (C. C. A. 6th), certiorari denied, 314 U. S. 618; *Public Service Corporation of New Jersey* v. *S. E. C.*, 129 F. (2d) 899 (C. C. A. 3d), certiorari denied, 317 U. S. 691; *Hartford Gas Co.* v. *S. E. C.*, 129 F. (2d) 794 (C. C. A. 2d,); *Pacific Gas & Electric Co.* v. *S. E. C.*, 127 F. (2d) 378 (C. C. A., 9th), argued on rehearing December 1942. *Cf. Morgan Stanley & Co.* v. *S. E. C.*, 126 F. (2d) 325 (C. C. A. 2d).

[8] *National Labor Relations Board* v. *Southern Bell Telephone & Telegraph Co.*, decided May 3, 1943, Nos. 460–461, this Term: "Its conclusion is an inference of fact which may not be set aside upon judicial review because the courts would have drawn a different inference." In the present case the inference was not set aside, and petitioner must maintain that it was required to be set aside.

tion of independence on the part of petitioner. Similarly, Bond and Share in 1935 terminated its formal representation on the boards of its acknowledged subsidiaries, without relinquishing control over them. (R. 348.) The present officers and directors of American Gas owe their positions to associations with Bond and Share in the years when American Gas was concededly subject to its control. Bond and Share's continued confidence in the present management of American Gas is expressed in its uninterrupted practice of delivering its vote to petitioner's proxy committees.

In the same way, the advent of independent financing by American Gas was not the result of any dispute between it and Bond and Share but was brought about rather by the passage of the Holding Company Act and the strategic maneuvers of petitioner and Bond and Share with regard to regulation thereunder. Bond and Share's influence over petitioner's financing still persisted in the activities of the common chairman of the boards, in the employment of the same general counsel, and in the continued use of the same investment houses. The withdrawal of petitioner from Bond and Share's group-purchase contracts and the retirement of petitioner's president as director of admitted Bond and Share subsidiaries were likewise made advisable by the passage of the Act and by petitioner's application under Section 2 (a) (8).

The difference of opinion between petitioner and Bond and Share over methods of complying with Section 11 of the Act was dissipated without any substantial conflict, and petitioner's plan was filed with the approval of the Bond and Share representatives on its board. Moreover, the Commission found that the alleged differences between the two plans (insofar as Bond and Share's plan dealt with petitioner's properties) were more apparent than real. (R. 57–58.) "Under both proposals, if the Commission were to accept the plans, as filed, applicant and its system would remain substantially unchanged." (*Ibid.*)

Against these indicia of petitioner's asserted present independence, the Commission considered the persistent elements of Bond and Share's historic influence over its organization, development, and management. Cf. *N. L. R. B.* v. *Link-Belt Co.*, 311 U. S. 584, 600. On the whole record it appeared that the profitable nature of Bond and Share's investment in petitioner, its predominant voting position, the continuance of Bond and Share personnel and tradition in American Gas, and, indeed, the very nature of Bond and Share's business,[9] combined to provide both incentive and

[9] Electric Bond and Share Company, Report to Stockholders, December 31, 1939, p. 8:

"The Electric Bond and Share Company is not an investment banker, for it does not deal in securities. It is not an investment trust, for it does not have a changing portfolio of securities of companies in which it has no continuing interest and as to which it has no managerial responsibility. On the contrary, it is the parent company in a large

capacity to make petitioner continue responsive to Bond and Share's desires. Compare *N. L. R. B.* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241. As the court below observed (R. 529):

> Petitioner may have advanced, in the terminology of empire, from status as dependency or colony to one of a dominion, but it has not become an independent empire as a matter of law.

2. Petitioner contends that the Commission and the court below have adopted an erroneous interpretation of the statutory phrase "controlling influence." We submit that this contention is unfounded. The interpretation adopted by the Commission and the court is completely in harmony with that approved by all the courts which have dealt with this problem.[10]

The Commission has in this case, as in previous cases, interpreted the phrase "controlling influ-

---

and successfully public-utility system, which it has developed, financially and technically, from the early days of the electric industry down to the present time."

(Unprinted Transcript of Record, Vol. XI, p. 4461.)

[10] *Detroit Edison Co.* v. *S. E. C.*, 119 F. (2d) 730 (C. C. A. 6th), certiorari denied, 314 U. S. 618; *Public Service Corporation of New Jersey* v. *S. E. C.*, 129 F. (2d) 899 (C. C. A. 3d), certiorari denied, 317 U. S. 691; *Hartford Gas Co.* v. *S. E. C.*, 129 F. (2d) 794 (C. C. A. 2d); *Pacific Gas & Electric Co.* v. *S. E. C.*, 127 F. (2d) 378 (C. C. A. 9th), argued on rehearing December 1942. In the *Pacific Gas* case the majority view of the meaning of "controlling influence" was consistent with that of the other decisions although the opinion did contain a new interpretation of the portion of the section dealing with "public interest."

ence" to require something less in the form of influence over the management or policies of a company than "control." It embraces a position of domination whether or not dominion is overtly exerted. The form in which a "controlling influence" is exercised is, however, unimportant; it is the fact of "controlling influence" rather than the device employed to achieve it that is important. *H. M. Byllesby & Company,* 6 S. E. C. 639 (1940). The determination of this fact has frequently been a troublesome question, necessitating, as in this case, the most thorough exploration of historical and potential relationships between the companies involved. *Cf. Engineers Public Service Co.,* Holding Company Act Release No. 2897, July 24, 1941, p. 35. As the interpretation of the expert body charged with the administration of the Act, this construction of "controlling influence" is entitled to,[11] and has been given, great weight.[12]

Petitioner's references to the legislative history of Section 2 (a) (8) are beside the point (Pet. Br., pp. 13–16). Senator Wheeler's remarks were directed generally to the type of regulation which the Act provides rather than to precise definitions. Viewed in their context these state-

[11] *Gray* v. *Powell*, 314 U. S. 402, 412.

[12] *Detroit Edison Co.* v. *S. E. C.*, 119 F. (2d) 730 (C. C. A. 6th), certiorari denied, 314 U. S. 618; *Public Service Corporation of New Jersey* v. *S. E. C.*, 129 F. (2d) 899 (C. C. A. 3d) certiorari denied, 317 U. S. 691; *Pacific Gas & Electric Co.* v. *S. E. C.*, 127 F. (2d) 378 (C. C. A. 9th), argued on rehearing, December 1942.

ments describe merely the more usual situations embraced by the Act and do not attempt to deal with all variations. The committee reports cited by petitioner make no attempt to delimit the phrase "controlling influence." Instead, they indicate an intention to provide flexibility "in order that title I can meet the varied and subtle forms which corporate interrelationships have in the past and will in the future take." (Quoted in Pet. Br., p. 15.)

3. The manner in which the standards of Section 11 will apply to petitioner as a subsidiary of Bond and Share is irrelevant to the determination of its status under the Act, and affords no basis for further review by this Court. See *Electric Bond & Share Co.* v. *S. E. C.*, 303 U. S. 419, 443.

CONCLUSION

The decision of the court below is correct. It turns largely upon the facts, and presents no question calling for further review. The petition should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
JOHN F. DAVIS,
Solicitor,
THEODORE L. THAU,
W. VICTOR RODIN,
Attorneys,
Securities and Exchange Commission.

MAY 1943.

APPENDIX

Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U. S. C., Sec. 79:

SEC. 2 (a) (8) "Subsidiary company" of a specified holding company means—

(A) any company 10 per centum or more of the outstanding voting securities of which are directly or indirectly owned, controlled, or held with power to vote, by such holding company (or by a company that is a subsidiary company of such holding company by virtue of this clause or clause (B)), unless the Commission, as hereinafter provided, by order declares such company not to be a subsidiary company of such holding company; and

(B) any person the management or policies of which the Commission, after notice and opportunity for hearing, determines to be subject to a controlling influence, directly or indirectly, by such holding company (either alone or pursuant to an arrangement or understanding with one or more other persons) so as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that such person be subject to the obligations, duties, and liabilities imposed in this title upon subsidiary companies of holding companies. The Commission, upon application, shall by order declare that a company is not a subsidiary company of a specified holding company under clause (A) if the Commission finds that (i) the applicant is not controlled, directly or indirectly,

by such holding company (either alone or pursuant to an arrangement or understanding with one or more other persons) either through one or more intermediary persons or by any means or device whatsoever, (ii) the applicant is not an intermediary company through which such control of another company is exercised, and (iii) the management or policies of the applicant are not subject to a controlling influence, directly or indirectly, by such holding company (either alone or pursuant to an arrangement or understanding with one or more other persons) so as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the applicant be subject to the obligations, duties, and liabilities imposed in this title upon subsidiary companies of holding companies. The filing of an application hereunder in good faith shall exempt the applicant from any obligation, duty, or liability imposed in this title upon the applicant as a subsidiary company of such specified holding company until the Commission has acted upon such application. Within a reasonable time after the receipt of any application hereunder, the Commission shall enter an order granting, or, after notice and opportunity for hearing, denying or otherwise disposing of, such application. As a condition to the entry of, and as a part of, any order granting such application, the Commission may require the applicant to apply periodically for a renewal of such order and to file such periodic or special reports regarding the affiliations or intercorporate relationships of the applicant as the Commission may find necessary or appropriate to enable it to determine whether

in the case of the applicant the conditions specified in clauses (i), (ii), and (iii) are satisfied during the period for which such order is effective. The Commission, upon its own motion or upon application, shall revoke the order declaring such company not to be a subsidiary company whenever in its judgment any condition specified in clause (i), (ii), or (iii) is not satisfied in the case of such company, or modify the terms of such order whenever in its judgment such modification is necessary to ensure that in the case of such company the conditions specified in clauses (i), (ii), and (iii) are satisfied during the period for which such order is effective. Any action of the Commission under the preceding sentence shall be by order. Any application under this paragraph may be made by the holding company or the company in respect of which the order is to be entered, but as used in this paragraph the term "applicant" means only the company in respect of which the order is to be entered.

U. S. GOVERNMENT PRINTING OFFICE: 1943